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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JANE DOE,

Plaintiff and Appellant,

v.

ASTRAZENECA LP et al.,

Defendants and Respondents.

D042523

(Super. Ct. No. GIC 797365)

APPEAL from an order of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Order reversed.

In this consumer class action, plaintiff Jane Doe sued AstraZeneca LP (AstraZeneca),<sup>1</sup> a manufacturer of Prilosec® and other prescription drugs, and Albertsons, Inc., Sav-on Drug Stores, Inc., Osco Drug, Inc., and Jewel Osco, Inc. (collectively Albertsons), a nationwide chain of drug and food stores, alleging that

AstraZeneca and Albertsons conspired to engage in illegal business practices in violation of Business and Professions Code section 17200 et seq. by unlawfully using and disclosing confidential medical information from pharmacy customers' prescriptions, without the customers' authorization or consent, to mail a series of letters to customers regarding prescription refills. Doe voluntarily dismissed her action without prejudice<sup>2</sup> after the court sustained with leave to amend AstraZeneca's general demurrer to Doe's first amended complaint. The court granted special motions brought by AstraZeneca and Albertsons under California's anti-SLAPP statute (Code Civ. Proc.,<sup>3</sup> § 425.16) to strike Doe's amended complaint.<sup>4</sup> Applying the mandatory attorney fees provisions of the anti-SLAPP statute, the court entered a judgment awarding reasonable attorney fees and costs

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<sup>1</sup> AstraZeneca asserts that Doe's pleadings erroneously referred to it as AstraZeneca PLC.

<sup>2</sup> On April 25, 2003, the court granted Doe's request for dismissal of this action without prejudice, and entered the dismissal nunc pro tunc as of April 18 of that year. Because Doe's notice of appeal shows she has not appealed the dismissal, we shall not discuss it further.

<sup>3</sup> All further statutory references are to the Code of Civil Procedure unless otherwise specified.

<sup>4</sup> "SLAPP" is an acronym for "strategic lawsuits against public participation." (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 328 (*Bernardo*).) "In *Dowling* [*v. Zimmerman* (2001)] 85 Cal.App.4th [1400,] 1414, this court explained that '[a] SLAPP lawsuit is generally defined as a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." [Citation.]' (*Bernardo, supra*, 115 Cal.App.4th at p. 340.) "As we also observed in *Dowling*, '[s]ection 425.16 was enacted in 1992 to deter and prevent SLAPP suits, and is "designed to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition." [Citation.]' (*Bernardo, supra*, 115 Cal.App.4th at p. 340.)"

in favor of AstraZeneca in an amount exceeding \$18,000 and in favor of Albertsons in an amount exceeding \$14,000.

Doe appeals the order granting AstraZeneca's and Albertsons's anti-SLAPP motions to strike, and the corresponding awards of fees and costs in their favor under the anti-SLAPP statute.<sup>5</sup> She contends that (1) Albertsons's special motion to strike was procedurally defective under section 425.16, subdivision (f)<sup>6</sup> and *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1387-1390, in that Albertsons noticed the motion for hearing on April 25, 2003, more than 30 days after service of the motion, and it failed to file a declaration indicating that an earlier hearing date was not available; (2) newly enacted section 425.17 (effective January 1, 2004) immunizes this action from AstraZeneca's and Albertsons's anti-SLAPP motions to strike because her suit meets the public interest criteria set forth in subdivision (b), and it arises from their commercial speech activity as defined in subdivision (c), of that section;<sup>7</sup> (3) section 425.17 applies

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<sup>5</sup> In her notice of appeal, Doe also stated she was appealing from the court's order sustaining AstraZeneca's demurrer to her first amended complaint. Doe, however, does not argue on appeal in either her opening brief or her reply brief that the court erred in sustaining the demurrer. We thus deem the issue waived.

<sup>6</sup> Section 425.16, subdivision (f) provides in part: "The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing."

<sup>7</sup> Section 425.17, subdivision (b) provides: "Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision. [¶] (2) The action, if successful, would

to causes of action like Doe's that accrued before that section's effective date of January 1, 2004, because it is a procedural statute that does not change the legal consequences of past conduct; (4) assuming that section 425.17 does not apply, this court in *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 191-193 rejected *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, as viable authority for protecting a defendant's commercial speech activity under section 425.16; (5) assuming that the new law does not apply, recent case law<sup>8</sup> establishes that there is no public

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enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

Subdivision (c) of that section provides: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: "(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue."

<sup>8</sup> Doe cites *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39; and *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26.

interest in whether a specific individual refills a prescription for a specific drug; and (6) Doe established a probability of prevailing on her claim because she produced competent evidence that AstraZeneca and Albertsons used their customers' confidential medical information for marketing purposes without written authorization.

Because AstraZeneca and Albertsons stipulate they do not oppose this appeal to the extent Doe seeks reversal of both the order granting their anti-SLAPP motions, and the awards of attorney fees and costs under the anti-SLAPP statute, we reverse the order and the awards of fees and costs.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Doe's Pleadings*

In October 2002, Doe filed her original complaint against Albertsons and AstraZeneca, a pharmaceutical company that helps to sponsor Albertsons's prescription refill reminder program, which involves mailing letters to Albertsons's pharmacy customers regarding the need to refill their prescriptions. In this class action, Doe challenged that program on the grounds the program allegedly violates the privacy rights and medical confidentiality of Albertsons's pharmacy customers. Doe thereafter filed her operative first amended complaint against AstraZeneca and Albertsons, alleging that their prescription refill reminder program violated California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

*AstraZeneca's Demurrer and Anti-SLAPP Motion To Strike*

AstraZeneca challenged the amended complaint by filing both a general demurrer and a special motion to strike that pleading under the anti-SLAPP statute (AstraZeneca's SLAPP motion).

*Albertsons's Anti-SLAPP Motion To Strike*

In March, while those proceedings were pending, Albertsons filed its own anti-SLAPP motion to strike Doe's amended complaint. The hearing on that motion was set for April 25.

*Order Sustaining AstraZeneca's Demurrer with Leave To Amend*

The court issued a telephonic ruling sustaining AstraZeneca's demurrer with leave to amend, but took AstraZeneca's SLAPP motion off calendar. At AstraZeneca's request, the court set these matters for oral argument on April 18, 2003.<sup>9</sup>

During the April 18 oral argument proceeding, the court confirmed the telephonic ruling sustaining AstraZeneca's demurrer, but put AstraZeneca's SLAPP motion back on calendar to be heard along with Albertsons's SLAPP motion on April 25.

*Order Granting the Anti-SLAPP Motions To Strike*

On April 25, the court issued a telephonic ruling stating it would address the merits of AstraZeneca's and Albertsons's anti-SLAPP motions to strike Doe's first amended complaint "to determine if [AstraZeneca and Albertsons] are entitled to an award of attorney[] fees." The court granted the SLAPP motions, relying in part on the

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<sup>9</sup> All further dates refer to calendar year 2003.

analysis the court set forth in its order sustaining AstraZeneca's demurrer. On May 2, following oral argument, the court issued an order (May 2 order) confirming its April 25 telephonic rulings.

*Order Granting AstraZeneca's and Albertsons's Motions for Fees and Costs*

Both Albertsons and AstraZeneca brought motions seeking to recover attorney fees and costs under the anti-SLAPP suit statute. On June 20, the court issued a final order granting both motions, awarding \$18,381 in fees to AstraZeneca, and \$13,690 in fees to Albertsons, and costs in an unspecified amount to AstraZeneca and Albertsons as the prevailing parties.

*Judgment and Appeal*

The court entered judgment awarding reasonable attorney fees and costs in the following amounts: \$18,620.50 in favor of AstraZeneca, and \$14,637.40 in favor of Albertsons.

In her timely notice of appeal, Doe stated that she was appealing from both the court's May 2 order granting AstraZeneca's and Albertsons's SLAPP motions, and the court's April 18 order "granting [AstraZeneca's] Demurrer to [Doe's] First Amended Complaint."

DISCUSSION

In this appeal, Doe seeks reversal of both the May 2 order granting AstraZeneca's and Albertsons's anti-SLAPP motions to strike Doe's first amended complaint (the May 2

order), and the awards of attorney fees in favor AstraZeneca and Albertsons under the anti-SLAPP statute (§ 425.16, subd. (c)).<sup>10</sup>

In their respondent's briefs, AstraZeneca and Albertsons stipulate that they do not oppose the appeal to the extent Doe seeks reversal of the order granting their SLAPP motions and the corresponding awards of attorney fees and costs under the anti-SLAPP statute.

Based on the statements of nonopposition set forth in the briefs submitted by AstraZeneca and Albertsons, we reverse both the May 2 order granting AstraZeneca's and Albertsons's anti-SLAPP motions to strike, and the awards of attorney fees and costs under the anti-SLAPP statute. Although Doe seeks reversal of the May 2 order on numerous grounds, in light of AstraZeneca's and Albertsons's stipulations we need not and do not reach the merits of Doe's contentions that the court erred in granting the SLAPP suit motions.

#### DISPOSITION

The May 2 order granting AstraZeneca's and Albertsons's anti-SLAPP motions to strike the first amended complaint, and the corresponding awards of attorney fees and

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<sup>10</sup> Section 425.16, subdivision (c) provides: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her *attorney's fees and costs*. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Italics added.)



costs in their favor under the anti-SLAPP statute, are reversed. Doe shall recover her costs on appeal.

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NARES, Acting P. J.

WE CONCUR:

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McINTYRE, J.

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IRION, J.